DEC 4 2000 (13)

Supreme Court, U.S.
FILED
DEC 4 2000
CLERK

No. 99-2035

In The

Supreme Court of the United States

COOPER INDUSTRIES, INC.,

Petitioner,

v.

LEATHERMAN TOOL GROUP, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* ALLIANCE OF AMERICAN INSURERS AND NATIONAL ASSOCIATION OF INDEPENDENT INSURERS IN SUPPORT OF PETITIONER

RICHARD HODYL, JR.*
MARK R. MISIOROWSKI
Attorneys for Amici Curiae
ALLIANCE OF AMERICAN INSURERS
NATIONAL ASSOCIATION OF
INDEPENDENT INSURERS
**Counsel of Record*

WILLIAMS MONTGOMERY & JOHN, LTD.
Twenty North Wacker Drive
Suite 2100
Chicago, Illinois 60606
(312) 443-3200

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

17 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST OF *AMICI CURIAE*.... 1

SUMMARY OF ARGUMENT..... 2

ARGUMENT 4

I. IN RESOLVING THE QUESTION PRESENTED, THE PUBLIC POLICY OBJECTIVE OF DETERRENCE FAVORS THE ADOPTION OF THE DE NOVO STANDARD OF REVIEW 4

II. THE DE NOVO STANDARD OF REVIEW SHOULD BY ADOPTED BY THIS COURT BECAUSE IT PROTECTS LITIGANTS' DUE PROCESS RIGHTS 10

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) 8

Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984) 10, 11

Honda Motor Co. v. Oberg, 512 U.S. 415 (1994) 10

Inter Medical Supplies, Ltd. v. EBI Medical Systems, Inc., 181 F.3d 446 (3rd Cir. 1999).....4, 9

Johansen v. McGill, 170 F.3d 1320 (11th Cir. 1999) 4

Miller v. Fenton, 474 U.S. 104 (1985)..... 11

Ornelas v. United States, 517 U.S. 690 (1996) 11

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) 4, 5, 13

United Phosphorus, Ltd. v. Midland Fumigant, Inc., 205 F.3d 1219 (10th Cir. 2000)..... 4

United States v. Bajakajian, 524 U.S. 321 (1998) 11

CONSTITUTIONAL PROVISIONS

U.S. Const. Art. VI..... 12

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The Alliance of American Insurers (hereinafter "Alliance") and the National Association of Independent Insurers (hereinafter "NAII") are the leading voices of the insurance industry. Together, these two trade groups represent over 700 insurance companies across the nation.

Property and casualty insurance companies of all types and size belong to the Alliance and NAII. Member companies range from small business enterprises that write insurance in only one state through insurers that conduct business nationwide. People from every walk of life, including students, families, small business owners, laborers, farmers, and professionals purchase insurance from Alliance and NAII member companies. Virtually every type of business or organization imaginable, from the neighborhood bakery to international corporations, also rely on these insurers for their expertise in investigating claims, mediating and settling disputes, and providing a legal defense in trial and appellate courtrooms across the country.

As the result of our daily interaction with our nation's courts and our relationships with our policyholders, we know firsthand that the American public treasures the judicial branch and we recognize the positive impact that the judicial branch has on society. *Amici*

---

[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amici Curiae*, their members, or their counsel, made a monetary contribution to the preparation and submission of this brief.

are deeply concerned about the selection of the appropriate standard of review because the designation of the appropriate standard has the potential to strengthen or weaken the relationship between the judicial branch and society, particularly in those cases where punitive damage awards have been impermissibly upheld due to the absence of meaningful analysis.

SUMMARY OF ARGUMENT

Courts have used the appellate review process to shape our nation's fabric. To foster the legitimacy of "judicial review," courts have successfully utilized written opinions which explain in detail the issue presented, the reasoning applied, and the rationale used to arrive at their decisions. Indeed the vehicle of detailed written decisions illuminates the path for members of society to follow.

The de novo standard of review, delivered through the medium of a detailed written opinion, is of critical importance in punitive damage cases because:

(1) punitive damage decisions are meant to deter others from reprehensible and outrageous conduct; and

(2) detailed written opinions will continue to educate lower courts, litigants, and society at large of crucial constitutional considerations and will provide a better understanding of when an application of the *Gore* standards violates the Constitution.

If the standard of review used in punitive damage cases is minimized, then the objective of deterrence may be directly threatened and there becomes a real danger that ill-conceived or unconstitutional lower court rulings may become the foundation of future common law. Such an outcome will undermine the public's faith in the American judicial system because the initial error will have been allowed to stand.

Equally important, this Court's prominence has been elevated over time due to this Court's zealous defense of constitutional rights. This case presents a delicate question in that the Petitioner's rights were abridged by a component of the judicial system itself. In acknowledging that the Constitution and the rights afforded thereunder are supreme, this Court should adopt a de novo standard of review. This heightened standard of review will safeguard Petitioner's constitutional rights, continue the judiciary's tradition of zealously protecting fundamental rights, and further the judiciary's cherished status as the most respected institution Americans possess.

For the foregoing reasons, *Amici* respectfully request that this Court adopt the de novo standard of review in this case and rule in favor of Petitioner.

ARGUMENT

I. IN RESOLVING THE QUESTION PRESENTED, THE PUBLIC POLICY OBJECTIVE OF DETERRENCE FAVORS THE ADOPTION OF THE DE NOVO STANDARD OF REVIEW.

Punitive damage awards serve two primary objectives. The first is to punish the defendant for its act or omission. Second, punitive damage awards are calculated to prevent and deter the defendant from undertaking similar misconduct in the future. *See, e.g., Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991). Thoughtful review of *Haslip* and other authorities reveals that the objective of deterrence applies not only to the named defendant, but is also intended to alert, prevent and discourage others from committing comparable misdeeds. Viewed in this context, punitive damage awards have an "outward deterrent effect" to guide business, commerce and our society as a whole. *Amici* now come before this honorable Court as a voice from that broader population.

Amici believe that the second objective, that of deterrence or prevention, come the closest to being met where the appellate court delineates the issues, reasoning, analysis and conclusions behind its decision. *See e.g. Johansen v. McGill*, 170 F.3d 1320 (11th Cir. 1999) (applying de novo standard of review); *Inter Medical Supplies, Inc. v. EBI Medical Systems, Inc.*, 181 F.3d 446 (3rd Cir. 1999) (applying de novo standard of review); *United Phosphorus, Ltd. v. Midland Fumigant, Inc.*, 205 F.3d 1219 (10th Cir. 2000) (applying de novo standard of review). This approach is fundamental and well-recognized. *Amici* note that the federal appellate court stands in a unique position to

provide litigants, as well as the business community, the insurance industry, and the legal profession, with learned guidance, perspective and judicial insight. *Amici* believe this time proven framework is an efficient means to continue to meet those objectives. The public policy objective of outward deterrence requires the appellate court to explicate the substance of its constitutional analysis, so others may benefit from the court's wisdom.

Since their inceptions, the Alliance and NAII, for the benefit of their member insurance companies, have closely monitored rulings of appellate courts on a wide range of legal issues. One particular issue that has received considerable attention is the constitutional limit that applies to punitive damage awards. Indeed, members of the insurance industry have appeared directly before this Court on this very issue, at times as a party and at times as *Amici Curiae*. *See e.g. Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

The pronouncements from appellate court decisions are vital to the associations' member companies and to the individuals, organizations and companies our members insure. First, the industry strives to comprehend appellate court decisions on the award of punitive damages to ascertain the distinctions between permissible acts versus sanctionable conduct. More importantly, detailed written opinions using the de novo standard of review afford our member companies and their policyholders with a fuller understanding of their constitutional rights and protections. This information is vital in the investigation of claims and formulation of legal defenses for the policyholders our member companies insure. Similarly, the written opinions that address the nature of

sanctionable conduct, enable member companies to challenge and address questionable practices of their insureds, and assist our member companies in deciding whether to provide certain types of insurance coverage, where insurance coverage will be offered, and at what price insurance coverage will be afforded to customers.

Second, appellate opinions aid member insurance companies in assessing their potential financial exposures under insurance contracts sold to policyholders. *Amici* recognize that there is no bright line mathematical formula by which to ascertain the upper limit beyond which punitive damages may not go. In the absence of such a bright line test, it is critical to those we insure and to our member insurance companies that we continue to receive detailed and meaningful written opinions from appellate courts. This information allows us to better judge the totality of risks our policyholders and member companies face and to continue our future business practices in a manner consistent with the rule of law.

Third, appellate opinions on the topic of punitive damages are scrutinized for precedential value so that corporate counsels and boards of directors can assess possible exposures should the insurance company itself be named as a party defendant in litigation. Finally, insurers review appellate opinions on punitive damages to assess if they may be entitled to recover punitive damages when the insurer is a party plaintiff in litigation.

The information gleaned from appellate court decisions is conveyed to member insurance companies through a variety of means. Both the Alliance and the

NAII host educational seminars and forums where prominent members of the legal community are invited to address the membership about trends and developments in the law. Frequently, punitive damage issues are on the forefront of these discussions. Also, the Alliance and NAII both have formed committees that address specific topics relevant to the insurance industry. And again, the topic of punitive damages receives constant attention through the committee structure. Finally, the Alliance and NAII regularly inform their members about trends or changes in punitive damage jurisprudence through various publications, newsletters and electronic communications. The issue of punitive damage draws significant attention throughout the insurance industry. *Amici* cannot over-emphasize the significant attention that is paid to appellate court rulings on the issue of punitive damages.

Amici are concerned that the adoption of the abuse of discretion standard of review by this Court will foster and encourage appellate courts to provide cursory opinions that lack any meaningful guidance to our member companies and the entities they protect. If future appellate court decisions follow the abuse of discretion standard of review and mirror the exhibits appended in App. 24a and App. 3a-4a to Cooper's Petition, *Amici* are concerned that the lack of meaningful analysis will leave insurance policyholders and the remainder of society to speculate about what behavior will be subject to punitive damage awards. Blurring the nation's understanding of what behavior may be sanctioned defeats the deterrent effect that punitive damages are designed to foster. As such, *Amici* believe the abuse of discretion standard, as applied in this case, undermines the deterrent effect on

both the defendant and society. Worse yet, cursory opinions which are void of meaningful review, obfuscate the ability of litigants to comprehend and zealously assert their constitutional rights.

This effect is evident in the instant litigation. Appended to Petitioner's Petition For A Writ of Certiorari are the written opinions of the district court and the Ninth Circuit Court of Appeals on the due process issue. (See App. 24a and App. 3a-4a to Cooper Industries, Inc., Petition For A Writ Of Certiorari). The Ninth Circuit Court of Appeals applied the deferential abuse of discretion standard without any reference to the *Gore*[2] guideposts. Furthermore, the district court dedicated but one sentence to the *Gore* case. *Amici* assert that Ninth Circuit's cursory opinion affirming the district court's perfunctory constitutional analysis provides no deterrent effect whatsoever. *Amici* are gravely concerned that great harm and confusion will result from further application of the abuse of discretion standard of review in the punitive damage context. Indeed, the defects inherent in the abuse of discretion standard will thwart future application of the *Gore* guideposts, thus blurring the line at which punitive damage awards exceed constitutional rights.

---

[2] *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) (three guideposts to determine whether a punitive damage award is unconstitutionally excessive are: (1) the reprehensibility of the behavior, (2) the disparity between the harm or potential harm suffered and the punitive damages award, and (3) the difference between this remedy and the civil penalties authorized or imposed in comparable cases.

Amici believe that the deterrence objective can only be achieved where an appellate court performs a detailed and meaningful review and analysis of the evidence that gives rise to the award. Where a litigant asserts that a punitive damage award imposed upon it is unconstitutionally excessive, *Amici* believe it is the solemn responsibility of the appellate court to provide stringent safeguards to ensure that constitutional limits on punitive damages have not been exceeded. The Constitution affords federal judges lifetime tenure. Our nation's founding fathers provided the judiciary with autonomy to ensure that the judiciary will fully explain their decisions when shaping the law. *Amici* agree with the Third Circuit Court of Appeals when it recognized its true responsibility and stated it is the appellate court's role to serve as the "gatekeeper in reviewing punitive damage awards." *Inter Medical Supplies, Ltd. v. EBI Medical Systems, Inc.*, 181 F.3d 446, 468 (3d Cir. 1999). *Amici* fear that the absence of de novo review may perpetuate a trial court's unconstitutional ruling.

Thus, *Amici* urge this Court to reject the abuse of discretion standard and to adopt a standard of review that requires the appellate court to conduct a detailed appraisal of the evidence bearing on the punitive damage award and that also requires the appellate court to explicate the substance of its constitutional analysis in a published opinion. This heightened level of review serves as a constitutional check and balance to ensure that the trial court has fully addressed a litigant's constitutional challenge to the punitive damage award. The second component of issuing a detailed written opinion is the means by which the goals of deterrence can be achieved.

II. THE DE NOVO STANDARD OF REVIEW SHOULD BY ADOPTED BY THIS COURT BECAUSE IT PROTECTS LITIGANTS' DUE PROCESS RIGHTS.

Cases involving constitutional rights warrant a de novo standard of review. The de novo standard of review has been applied by this Court in other cases where fundamental constitutional rights were threatened. The de novo standard of review should also be applied here because "punitive damages pose an acute danger of arbitrary deprivation of property." *See e.g. Honda v. Oberg*, 512 U.S. 415, 432 (1994). Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of the defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local preferences. *Honda v. Oberg*, 512 U.S. 415, 432 (1994). Judicial review of the amount awarded is the safeguard that protects litigants from that danger. Accordingly, *Amici* urge this court to adopt the de novo standard of review here.

In *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), this Court applied a de novo standard of review where a litigant's First Amendment rights were at issue. There, the Court explained that an independent examination of the whole record was necessary to ensure that a judgment did not constitute a forbidden intrusion into the realm of free expression. *Bose Corp.*, 466 U.S. at 508. The Court further noted that it has an obligation to test challenged judgments against the guarantees of the

First and Fourteenth Amendments, and in doing so cannot avoid making an independent constitutional judgment on the facts of the case. *Bose Corp.*, 466 U.S. at 508, n.27. Similarly, in *United States v. Bajakajian*, 524 U.S. 321 (1998), this Court applied a de novo standard review where an individual raised an Eighth Amendment challenge under the Excessive Fines Clause. Also, in *Ornelas v. United States*, 517 U.S. 690 (1996), this Court held that the issue of whether reasonable suspicions and probable cause to make a warrantless search violated the Fourth Amendment should be reviewed de novo. Finally, in *Miller v. Fenton*, 474 U.S. 104 (1985), the Court noted that without exception, where the ultimate issue of a case is the "voluntariness" of a criminal defendant's confession under the Fifth Amendment, an independent federal determination is required.

Amici note that in each of the foregoing cases, the defendant was threatened with the deprivation of his constitutional rights. In response, this Court was quick to apply the de novo standard of review to ensure that the defendant's fundamental rights were zealously protected. Here, *Amici* note that Petitioner's due process rights weren't just threatened – they were violated. As the nation's most respected institution, this Court should adopt the de novo standard of review as this will afford Petitioner with the full level of protections they are due under the United States Constitution.

In addition, *Amici* recognize that in many of the standard of review cases previously decided by this Court, the deprivation of property, liberty, or other fundamental right was typically occasioned by an act of an executive branch or the legislative branch. In the instant

case, however, the deprivation of property involved a component of the judiciary, namely, the entry of an order that affirmed a jury's imposition of a punitive damage award. *Amici* believe that no valid distinction exists for treating an error occasioned from the judicial branch any differently from when an abridgment of someone's constitutional rights takes place at the hands of an executive branch or the legislative branch. Should the standard of review be one of deference, we then risk the perception that the interests of the judiciary, as a branch of government, outweigh individual fundamental rights. This turns the Constitution on its head.

The Constitution and the Bill of Rights are supreme[3] and together they underscore the sanctity of individual rights. Personal freedoms and protections must triumph over governmental conduct when the activities of the government contravene fundamental rights and privileges. The question to which this Court granted certiorari wisely recognizes that the standard of review of punitive damage awards implicates a cherished and fundamental constitutional right. This Court has previously espoused that a de novo standard of review is necessary to ensure that fundamental constitutional rights are protected under the First, Fourth, Fifth, Eighth and Fourteenth Amendments. Because what is at issue in the instant case

[3] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI.

is the unconstitutional deprivation of property in violation of the Fifth Amendment due process protections, *Amici* respectfully urge this Court to apply the same de novo standard of review here. This heightened standard of review will safeguard Petitioner's constitutional rights, continue the judiciary's tradition of zealously protecting fundamental rights, and further the judiciary's cherished status as the most respected institution Americans possess.

Accordingly, *Amici* respectfully request that this Court rule in favor of Petitioner Cooper Industries, Inc.

CONCLUSION

Amici respectfully urge this Court to adopt the de novo standard of review here. This Court's answer to the question presented will have a major impact on two crucial concerns.

The adoption of the de novo standard of review will further the interests of outward deterrence identified by this Court in *Haslip*, and serves to better illuminate the constitutional boundaries beyond which punitive damage awards may not go. This standard of review and the concomitant written opinion that explicates the court's detailed reasoning on fundamental constitutional issues will aid the American public as it enters the new millennium.

More importantly, the selection of the de novo standard of review assures the American public that this

Court is continuing its tradition of zealously protecting the constitutional rights of defendants.

For the reasons heretofore stated, *Amici* respectfully request that this Court rule in favor of Petitioner, Cooper Industries, Inc.

Respectfully submitted,

RICHARD HODYL, JR.*
MARK R. MISIOROWSKI
Attorneys for Amici Curiae
Alliance of American Insurers
National Association of
Independent Insurers
**Counsel of Record*

WILLIAMS MONTGOMERY & JOHN, LTD.
Twenty North Wacker Drive
Suite 2100
Chicago, Illinois 60606
(312) 443-3200